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IN THE
Supreme Court of the United States
October Term 1976

No. 75-1707

OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,
Appellants,

vs.

LEONARD PAUL HODORY,
Appellee

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

Motion of Local No. 1375, United Steel Workers of America for Leave to File Brief *Amicus Curiae* in Support of Appellee and Brief *Amicus Curiae*

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Motion by Local 1375 United Steel Workers of America for Leave to File *Amicus Curiae* in Support of Appellee

Local 1375 United Steelworkers of America hereby respectfully moves for leave to file the attached brief *amicus curiae* on behalf of Appellee in the instant case pursuant to Rule 42 of the Rules of this Court; Counsel for Appellants and Appellee have given consent to the filing of that brief.

INTEREST OF AMICUS CURIAE

Local 1375 is a local union of United Steelworkers of America whose members are employed at Republic Steel Corporation Plant, Trumbull County, Ohio, one of the plants shut down as a result of strike by coal miners at mines owned by the employer. Approximately one half of the members of the class represented by Appellee unemployed as a result of such shutdown are members of Local 1375, the remainder of the class being employees of United States Steel Company, similarly situated as an employer and *amicus curiae* in behalf of Appellants.

While profoundly concerned for the welfare of its members and interested in their obtaining unemployment compensation benefits in the instant case, as in all other cases in which it is properly due, Local 1375 is not in any sense a professional *amicus curiae* and moves for leave as such in this Court for the first time.

In normal course it leaves to its parent organization, United Steel Workers of America, or to the American Federation of Labor and Congress of Industrial Organizations the presentation of legal policy arguments in all appellate courts as *amicus curiae*. Local 1375 assumed that AFL-CIO would fulfill the function of adequate support to appellee's counsel in the instant case. It was not until January 11, 1977 that the Local was informed that the brief tendered for filing by AFL-CIO was without consent of Appellee's counsel, and instead with consent of Appellant's counsel, and that the disposition of this case "suggested" as preferred by AFL-CIO was to vacate the judgment in favor of Appellee, leaving the members of Appellee's class including more than 600 of this local's members to pursue vindication of their rights through the lengthy Ohio administrative system and judicial process more than two years after this litigation had commenced. For reasons set forth in Part I of brief tendered herewith this *amicus curiae* regards such suggested disposition as inimical to the welfare of its members as part of the class and as covertly in support of the position of Appellants, their adversary.

Officers of Local 1375 were informed by Appellee's counsel as recently as January 20, 1977 that leave had been granted for the filing of aforementioned brief of AFL-CIO, and on that day *amicus curiae* engaged counsel to seek leave and tender brief in its behalf as the sole *amicus curiae* in support of the position of its members.

Appellee and his class, in the filing and presentation of the case, in the three-judge court, were refused the services of counsel regularly retained by District 26 United Steelworkers, the supervisor of both this local and the local union representing employers of Ohio Works, United States Steel Corporation. They were there ably represented by present Appellee's counsel, a "store front" legal assistance association without support by local, state or international union organization. Counsel for Appellee are still performing magnificently against the tremendous pressures exerted by the State of Ohio, two giant corporations, the United States Chamber of Commerce and as *amicus curiae* in this case the labor organization of which all members of Appellee's class are bona fide members.

Appellee's counsel has single-handedly defended in brief against all argument delivered by adversaries and avowedly adversary *amici curiae* to the limit of its personnel and material resources. The "suggested" disposition offered by *amicus curiae* American Federation of Labor and Congress of Industrial Organizations was both completely unexpected and completely unwelcome to either appellee's counsel or to this *amicus curiae*. It is, in

reality, a flank attack which is beyond the capacity of Appellee or its counsel to protect against. Apart the need of assistance against a modern Lord Oxford at Barnet or Lord Grey at Northampton, Appellee and his counsel and the three judge panel have no friend among the friends of this Court to speak a word in their behalf. Arrayed against them in this Court, as against two farmers from Michigan some twenty years ago in *National Equipment Rental Ltd vs Zukhent 375 U.S. 311, 11 L. Ed 2d 354*, are the power and talent of the establishment both capital and labor.

THE ISSUE TO BE COVERED IN THIS BRIEF *AMICUS CURIAE*

The primary issue decided by the three-judge court was whether the denial of unemployment compensation benefits to Appellee and his class on the ground that their unemployment was due to a strike at another place by other workers from another union denied them due process, and equal protection of the laws. The equal protection issue has been exhaustively dealt with by the parties and other *amicus curiae* as has the preemption issue and this *amicus curiae* does not for this reason address these issues directly in brief.

The related due process issue, while ably discussed by counsel for Appellee, suffers in its presentation from the very wealth of citation and argument on the equal protection issue which immediately precedes it in brief. This *amicus curiae* desires to point up this related due process issue so that it might not be considered a make weight argument. This issue is dealt with in Part II of our brief.

Before reaching that issue, in Part I of our brief we deal with an issue touched on only obliquely by Appellants in the trial court, then utterly abandoned by them in this appeal. That is the abstention issue raised, improperly we believe, by *amicus curiae* AFL-CIO and argued by it without full and fair discussion of the long history of treatment of related portions of Ohio's unemployment compensation laws by its highest court.

We point out in tendered brief that the purpose of AFL-CIO in intruding the abstention issue, abandoned by Appellants, is to erect a barrier against later review of the action taken in *Kimball, Inc. v. Employment Security Commission*...US....., 45 U.S. L.W. 3247 (October 4, 1976).

However sympathetic this *amicus curiae* may be to the aims and purposes of the New Mexico Employment Security Act and the extremely liberal protection it gives to employees under all

conditions of a labor dispute, New Mexico is far away from Ohio, both geographically and in recently prevailing social philosophy. Erecting some barriers against review of *Kimbeli* may be excellent *haut politique* of our labor establishment, but we would prefer that the barrier not be constructed solely from the rights of our members to serve as a bloody angle at Spotsylvania Courthouse. To sacrifice the present rights of industrial employees in a heavily industrialized and populous state, on the wholly speculative dream that Ohio and forty-five other states will, in the forseeable future, march to the beat of New Mexico's drum of liberal protection is the sort of folly which results from wishful thinking. The suggestion of vacation and remand of a hard earned judgment risks a recent small gain in the standing of many workers on the dubious premise that New Mexico's solutions are the inevitable wave of immediate future. We argue against such folly and against such a dubious premise.

Respectfully submitted,

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SUMMARY OF ARGUMENT

In Part I of the Brief we examine the claim for application of absention at the appellate level, demonstrating that under the posture of the case at trial level the requisites for absention were not present or reasonably to be expected. In addition we examine, from a pragmatic view, actual interference and friction with the state judicial process and find there is none to date and none to be expected. In addition a brief survey of the Ohio State Administrative process discloses no interference even though absense thereof is not part of the heavy burden carried in decision to refuse intervention and that the abstention issue, as improperly raised by a non-party should be ignored.

In Part II we take up the neglected issue of due process as it appears in this case, demonstrating that the Ohio statute does not meet the tests set forth in *Vlandis and Weinberger* and that therefore the judgment of the Court below should be affirmed on due process grounds alone.

ARGUMENT

I

The issue of abstention, intruded into this case by two non-parties, acting in incongruous concert[1], is based on two primary considerations. The first, most elaborately articulated by this court after Ex parte Young 209 U.S. 123, (1908), in Younger v. Harris 401 U.S. 37, 91 S Ct 746, 27 L Ed 2d 669 (1971) is that of interference with the state's *judicial* process, then ongoing, or the "friction" basis. The second, less expressly put, but touched upon by one of amici in footnote only[2], may be termed the judicial administration basis.

The first of these bases is necessarily thrust upon the trial court for initial judgment in a semi-vacuum. That Court must weigh the factors, not only of present interference, but of future interference if the case becomes a protracted one. In the instant case the three judge panel devoted 40% of the verbiage of a comparatively terse opinion and 80% of its citations of authority in passing on the abstention issue[3], as then raised by present appel-

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[1]The major contribution is made by AFL-CIO as *amicus curiae*, devoting a major part of its brief to the "issue" pp. 2-15 Brief of *Amicus Curiae*, American Federation of Labor and Congress of Industrial Organizations. The principal purpose of the intrusion, *Kimbell Inc. v. Employment Security Commission of New Mexico, 45 U.S. L.W. 3247 (No. 75-1452) and Albequerque - Phoenix Express, Inc. v. Employment Security Commission, 88 NM 596, 544 P 2d 1161 (1975)* is also touched upon in brief of United States Chamber of Commerce, *Amicus Curiae* p. 18 n. 11.

[2]See brief of American Federation of Labor, Congress of Industrial Organizations p. 3-4 note 2: "The reason why the Board of Review has decided to await the final resolution of this case before deciding whether benefits are due either the Hodory class or the other steelworkers assertedly affected by the mine strike (see p. 4, infra) is not stated. While the airing and resolution of the state law questions could affect the merits of the constitutional adjudication (see pp. 13-15, infra) the only reverse effect of the constitutional issues upon the state administrative proceedings we can perceive is that if the order below is upheld it may be unnecessary for the Board to decide certain state law issues".

[3]See text and footnotes of opinion 408 F. Supp. 1018, 1022.

lants. At this stage of the proceedings interference and friction are almost an abstract concept to be resolved on the basis of the individual judge's experience, not only in the field of federal-state judicial relationships but practical background in the substantive field of the individual case and the probable incidence and duration of an existing or potential parallel case in the state system. For this the trial panel in the instant case was uniquely qualified. Two of its members were state court trial judges from the period of litigation of administrative appeals on eligibility of unemployed workers for unemployment compensation, discussed *infra*. One had experience in his own state court with a particularly lengthy and aggravating case of this type[4]. The third, the former executive of Ohio's largest city and a former state legislator, was thoroughly familiar with the machinery of administrative determination of unemployment compensation in laws which he helped, as legislater, to create, and was later Secretary of Health, Education and Welfare, supervising state systems.

The initial judgment of the panel was correct. Neither interference nor friction could have conceivably developed with the *judicial* process, since all cases were bottled up in agency determination in Ohio, where they would have remained for the duration of this case, even had the case not been filed[5]. Under the circumstances of this case there was no interference or any possible interference with the Ohio *judicial* process.

As to interference with the legislative process there was none. Ohio did, as all parties and *amici curiae* have noted, amend its statute (§ 4141.29 (D) (1) (A))[6] to put its qualifications provision in rough conformity with the laws of some forty other states and thus severed its tie with North Carolina medievalism, all during the course of the trial court's deliberations. The existence of the instant case might conceivably have hastened the Ohio General Assembly's action, but there is no evidence in the record that it caused it, or that the General Assembly was even conscious of the need to "beat the court" in avoiding future constitutional conflict.

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[4] Molded Fiber Glass Cases #630-699 Ashtabula County Court of Appeals, discussed p. 7 n. 23 in Order in the Courts, a Report on Time Span or Disposition of Litigation in Six Northeastern Ohio Counties, Knight Foundation, University of Akron, 1970.

[5] See infra p. as to the record of duration, in the administrative channels, of *Nunamaker* and *Leach* cases.

[6] Amendment effective December 2, 1975, See findings 408 F. Supp. 1018.

Was there interference with Ohio administrative action? The probabilities are against it, for as we point out, *infra*, the Ohio administrative machinery might well have taken as long to grind out a result as it did in *Nunamaker*[7] and *Leach*[8].

But while interference and friction are frequently only conceptualisms at trial court level and thus some basis of prediction may be required, that is not at all true at the appellate level. At such level, especially at the level of this Court, interference and friction are not merely discernible, but even measurable. Refusal to abstain has, by the time Notice of Appeal is filed and briefs are in, either produced interference and friction or it has not. In this case there is every evidence that it has not. The best indication comes from counsel for appellants himself. As chief legal officer of the state, he must supply legal counsel to every administrative board, commission and agency of the state, and he must defend the actions of each of them, when challenged, in every state court. Surely he is in the best position to determine the existence and extent of any interference at first instance. He raised the question, obliquely in the second and other defenses set forth in his answer to the complaint. The trial court responded with a measured and considered study of the effects of taking jurisdiction. The decision was one which might be assumed to create the maximum of interference. Yet, nearly two years later, the Attorney General of Ohio does not even mention abstention in his brief. The issue is raised by counsel for two *amici curiae* both from the ivory tower of a federal city five hundred miles away and without the slightest in empirical data to offer, even second hand. It is said that an appellate court, on an issue such as this, has 20-20 hindsight and *amici curiae* have a duty to improve such vision if they can. No effort on the part of those *amici curiae* in this direction is discernible.

The only result of following the suggestion of vacation and remand at this stage of proceedings would be for the Ohio state administrative process to adopt a dual standard of eligibility determination; one for cases arising after December 2, 1975, as to which the liberalized majority rule of eligibility, by current statute, must be followed; the other, including cases of the class represented by Appellee (1250 in number) as to which the old rule must be followed, during the same time frame of adjudication.

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[7] *Nunamaker v. United States Steel Corporation, 2 Ohio St 2d 55 206 NE 2d 206* reversing *Nunamaker v. United States Steel Corporation #4344*, Mahoning County Court of Appeals, unreported but reproduced in Appendix, the time count being make in par. 3 of Court of Appeals opinion.

[8] *Leach v. Republic Steel Corporation*, 176 Ohio St 221 199 NE 2d 3. Time count extracted from unpublished opinion in order in the Courts, supra N. 4 at p. 7 footnote 10.

The second basis for abstention, less commonly articulated, comes from the need to limit access to an overburdened federal district court, or at least to terminate the litigation quickly and on jurisdictional grounds and to avoid the pendency problems of protracted and delicate policy cases. There must be, in a word, either more judges or fewer cases which require final adjudication. This is particularly true of cases which are abstention susceptible since, from the usual need of three judge panels and the former requirement of direct appeal as of right, consume prodigious quantities of judge time and justice time and effort. Once more, this is an important consideration for the district judge who makes the initial determination of need for the three judge court, for the Chief Judge of the Circuit and for the panel itself. The absention issue must be carefully considered, as here it was, at that stage of the proceedings.

But on appeal, particularly to this Court, the same considerations do not apply. By this stage, in this case as in others, the federal facilities have already been used, and the federal judge time and energy substantially consumed. This is true whether the decision not to abstain, as made by the panel, was right or wrong. Nothing can now restore the lost time, energy and facilities used. They are irretrievable. The sole effect of vacating judgment and remanding the case to district court, with instructions to keep it pending while the state judicial process operates, is to add one more case, once disposed of, to the pending docket with every prospect of later expenditure of judicial time and effort in redoing that which has once been done. To those who play the numbers game and the statistical count, this is not merely one more pending case on the trial court docket, but one more component adding to the age of the average or median pending case on the statistics so carefully kept by the Administrative Office of the Courts. While these effects, with one case, may be minimal, considered the mass of cases of this type, the statistical impact is considerable, to say the least.

Of course this result is true in every part of the appellate process, to some degree. But it has special application to cases in which abstention is belatedly invoked. First it means longer pendency on remand, as above noted. Second, and more importantly, it involves failure to use the tool of 20-20 hindsight and to consider on an empirical or pragmatic basis whether the evils of interference and friction have in fact been intruded. If discernible interference has taken place, there is no alternative; the vacation and remand must be undertaken, not withstanding the pyramiding of judicial time and energy loss. But where, as here, there is, on an empirical basis, no discernible friction or interference, such additional judge time down the drain would be a calamity.

Even treating the invocation of abstention on a traditional abstract basis, the decision in the instant case should be the same. The test employed by the three judge panel in its memorandum opinion was sound. The court reasoned correctly that abstention applied primarily to cases in which there was an ongoing *judicial* proceeding and that the heavy burden emphasized in *Younger v. Harris, 401 U.S. 37, 91S Ct 746, 27 L. Ed 2d 669* and *Samuels v. Mackell, 401 U.S. 66, 91 S Ct 764, 27 L Ed 2d 688*, did not apply to situations in which only the administrative process was at work. The panel relied primarily on *Huffman v. Pursue, Ltd, 420 U.S. 592, 43 L Ed 2d 482* as its authority. We would have preferred to use *Steffel v. Thompson 415 U.S. 462 39 L Ed 2d 515 (1974)* and the viable remnants of *Dombrowski v. Pfister, 380 U.S. 479, 14 L Ed 2d 22 (1965)* for making the point, since these dealt directly with the administrative problem.[9] This is primarily a matter of selection, however; the principle remains the same. Citation of authority for the suggestion of vacation by its author does not, however, recognize the distinction made so carefully by the panel. Much of its profuse garnering of cases could safely be disregarded, given the state of the record here. The purely prospective court action alluded to by appellants at trial and detailed at secondhand by the suggesting *amicus curiae* simply is not appropriate or in accordance with fact.

These statements on appeal from the agencies to the Court as made[10] would appear to be based on expection, not actuality, since they betray some ignorance of the complications of and politico-economic influence at work to slow down administrative adjudication of unemployment claims under the Ohio scheme. First the administrator makes an initial determination of qualification or disqualification - entitlement or disentitlement to compensation. Then, on appeal, he makes a decision on reconsideration; if further review is requested the matter goes to the Board of Review, where a referee is assigned, takes evidence and ultimately makes a decision; if a claimant or employer is still disatisfied, the matter

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[9] "When no state [criminal] proceeding is filed, federal intervention does not result in duplicative local proceedings or disruption of the state [criminal] justice system". *Steffel v. Thompson*, 415 U.S. at 462, 39 L Ed 2d at 515 (brackets added) See also *Lake Carriers' Assn. v. MacMullen*, 406 U.S. 498, 509 32 L Ed 2d 257.

[10] Brief of American Federation of Labor and Congress of Industrial Organization at p. 4-5 "According to appellants '[t]he steel companies are appealing these decisions in the state courts'. This observation, made at second-hand may well be indicative of future determination not an observation of there present actually. The fact is that in most cases arising under § 4141.29 (D) (2) (A) (1) the employers here involved do, as a matter of course appeal to the Courts in due and leisurely course and in virtually all mass cases do so. See *Leach* and *Nunamaker* n. 6-7 *supra*.

is heard by a three member Board of Review on further appeal. Only when this last stage is completed does appeal to the Courts take place.[11] As noted *infra*, in policy cases such as the claims by appellee's class, to progress from the first to the fourth step in the administrative process not uncommonly takes up to two years time.

Both the administrator and the Board of Review are subject to executive appointment in Ohio and to a degree greater than in many other states are expected to reflect faithfully the politico-economic ideologies of the then current governor. Many of the Bureau of Unemployment Compensation (as then named) cases reaching the courts have coincided in their inception with a change of governors, particularly in 1957, 1959 and 1975.[12]

In cases filed just before inauguration of the governor, of course, the outgoing administrator may allow a claim. In the intervening three or four months which is a minimum for fourth stage action the composition of the Board of Review has changed and now a majority of the members will reflect the opposite point of view. It thus would be predictable that the favorable (to them) decision noted in Appellant's brief and repeated in *amicus curiae's*[13] was that of the outgoing administrator, and would have been almost automatically reversed by the Board of Review, had the cases proceeded in normal course and not, as reported,[14] been halted to await outcome of this case. Thus it is most improbable that a different result for the "other large group of steelworkers laid off at the same time by the same steel companies assertedly for the same reason" would, at the end of the administrative process, have occurred. Thus there was no probable variant result due to any unclearness (to Ohio's authorities at least) as to what constitutes unemployment "due" to a labor dispute. [15] A substantial predicate for abstention thus did not, in fact, exist.

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[11] An expedited access to the Courts, together with a by-pass of the lower state Courts, is provided by § 4141.28 (N) Ohio Revised Code in certain circumstances. It would appear, however, that each of steps detailed above must be followed for a representative case. It does not appear that this procedure was followed in related cases since no mention is made in briefs of any actual or intended certification of any case to the Supreme Court of Ohio as contemplated by § 4141.28 (N) Ohio Revised Code.

[12] *United Steel Workers v. Doyle* 168 Ohio St. 324, 154 NE 2d 623 (1958) (Supplemental Unemployment Benefits) arose in 1967-58; *Leach v. Republic Steel* 176 Ohio St 221 199 N E 2d 3, (1964) (Tidying up after strike) in 1959; *Nunamaker v. U.S. Steel Corporation* 2 Ohio St 2d 55 206 N E 2d 206 (1965) (Vacation pay) in 1960; the instant case in 1974.

[13] American Federation of Labor and Congress of Industrial Organization Brief p. 4-5.

[14] Jurisdictional Statement, at 6.

[15] American Federation of Labor and Congress of Industrial Organizations Brief at 5-6.

A subsidiary claim made for pronouncement of abstention at this level: that the Hodory class's ultimate success might well have been achieved without application of a constitutional issue and upon a statutory interpretation basis[16] seems most unlikely. The collection of Ohio cases[17] upon which it is based, and carefully prefixed with the appropriate but uninformative "See's cf's" of the best Ivy League law journal uniform citation style, add up to one conclusion: the "due to labor dispute" with one minor exception from a rural county general jurisdiction Court[18] has received a uniform application by all Ohio Courts of Appeals and its Supreme Court. Under all circumstances reported the "due to" clause was interpreted broadly and the disqualification was pronounced.

The demonstrated record of the Supreme Court of Ohio in interpreting sections of Ohio's Unemployment Compensation law, related to or predecessors of § 4141.29 (D) (1) (A) destroys any possibility of unclearness or ambiquity of the statute as locally interpreted or any amelioration of its strict disqualification provisions. The record extends over twenty years of strict construction and absolute disqualification for benefits.

The first of these cases, *United Steelworkers v. Doyle, 168 Ohio St. 324, 154 NE 2d 623 (1958)*, was concerned with whether receipt of supplemental unemployment benefits, pursuant to union management contract, was a disqualifying or benefit reducing factor in the receipt of state unemployment compensation payments. The administrator required deduction of the "private" payment in determining the amount due claimant. Referee and Board of Review affirmed this administrative determination. On appeal to the Courts both the Court of Common Pleas and the Seventh District Court of Appeals ordered payment of the state amount in full, without deduction. In both courts the employers[19] supported the steel workers' (claimants) position. Notwithstanding, with only the then administrator of workman's compensation represented by the Attorney General of Ohio[20], opposed to full

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[16] id at 6-9.

[17] *Cornell v. Bailey*, 163 Ohio St 50, 125 NE 2d 323 (1955); *McGee v. Timken Roller Bearing Company* 161 NE 2d 905 (1956); *Baumgarte v. Board of Review*, 186 NE 2d 146 (1961) and *Leach v. Republic Steel Corporation* 176 Ohio St 221, 199 NE 2d 3 (1964) to this list should be added *Adamski v. State Bureau of Unemployment Compensation* 108 Ohio App. 198, 161 NE 2d 907 (1956).

[18] *Baumgarte v. Board of Review*, 186 NE 2d 146, arose in Delphos, Allen County, Ohio and revolved around labor dispute with Fruehauf, whose primary plant was in Avon Lake, Ohio, more that 100 miles away and in the Cleveland-Canton-Wheeling-Pittsburgh complex. The case was not appealed from the Court of Common Pleas of Allen County and was not officially reported.

[19] Employers who supported the Steelworkers position included the employers in the instate case, Republic and U.S. Steel.

[20] The then Attorney General, through the Court of Appeals proceedings, is now the Chief Justice, Supreme Court of Ohio.

payment, the Supreme Court of Ohio reversed, reverting to the administrator's original position and claiming, over vigorous dissent by two senior members of the Court, that the language of the act absolutely required the determination made. The Ohio General Assembly immediately responded by not only amending the act to permit dual payment in full, but passing emergency legislation to make such payments immediately effective.[21] Commentary on the decision and the prompt legislative reversal of it noted that Ohio and its Supreme Court were in a small minority of four, including North Carolina.[22]

The second case, *Leach*[23], followed within a few years, and concerned the time of unemployment for a very few workers after the settlement of the steelworkers strike in 1959 and the recall of the majority of workers, caused by the asserted need to spend time tidying up the particular department for resumed production. Once more the Court disqualified the claimants from receiving state benefits. It used the apt language from an already repealed by amendment section of the act to justify the disqualification. Once more there was vigorous dissent, pointing out that the language used was from the previous law, not in effect when the unemployment occurred.[24]

Finally in 1965, the Court decided *Nunamaker v. U.S. Steel, 2 Ohio St. 2d 55, 206 NE 2d 206* involving layoffs and contracted for vacation pay as a disqualifying force. Under its union contract the employer was obligated to grant two weeks vacation pay. When layoffs were determined upon each claimant was informed, then asked if he wanted to take his vacation and vacation pay during the week in question and he so elected.[25] The administrator

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[21] See Teple, Supplemental Unemployment Benefits, 20 Ohio St. L J 583 at 584.

[22] Teple, p. cit. n. 21 at 584-5.

"Until the enactment of these benefits Ohio was one of a very few states which had failed to permit the concurrent payment of state unemployment insurance and private unemployment benefits adopted by most of the Ohio employers having supplemental payment plans.

FN 3 "Forty-three states have now taken action permitting supplementation of state unemployment benefits. . .Prior to 1959 only four states had prohibited such supplementation: Indiana, North Carolina, Ohio and Virginia.

at 590

". . .of the four states which adopted a contrary view, North Carolina and Ohio did so by agency rulings". [aided in Ohio's case by the Doyle decision] material in brackets added.

[23] *Leach v. Republic Steel Corporation* 176 Ohio St 221, 199 NE 2d 3.

[24] Gibson J. 176 Ohio St at 224-226, 199 NE 2d 5-6.

[25] For pertinent details of the stipulations and the union-management contract see opinion of the Court of Appeals, Mahoning County 4344, unreported but reproduced in Appendix hereto.

allowed the claims for the weeks in question and on reconsideration confirmed his action. After a two year delay, lasting through the gubernatorial election in 1962,[26] the Board .of Review reversed, disallowing them. The Court of Common Pleas reversed, allowing the claims and the Court of Appeals affirmed this judgment, one member dissenting.[27] On this record the Supreme Court reversed both lower courts, restoring the disallowance entered by the Board of Review, over the dissent of three justices.

Considered such a record of interpretation, disqualifying claimants for state compensation in every case, and twice reversing all lower court decisions to do so, it seems most unlikely that the Supreme Court of Ohio would perform as the suggesting *amicus curiae* indicates.[28] In fact, there seems to be no basis for belief that the Supreme Court of Ohio, at least prior to January 1977 and probably thereafter, would find any uncertain or ambiguous interpretation favoring "another large group of steel workers laid off at the same time by the same steel companies for the same season". They would have received the same ultimate fate of disqualification of claim for the same reason and probably at about the same time from the Supreme Court of Ohio.

The test of amiguity and uncertainty, so necessary for the application of the abstention doctrine, fails in this case and there remains no basis for considering the suggestion of vacation and remand.

II

In large part, the lower Court, the Appellee, the Appellants, and the various *amici curiae* have applied an equal protection analysis to the facts of this case. Yet the Appellee did plead a due process issue in his complaint; the lower court did mention the issue in its Memorandum Opinion and Order; and the issue has received some consideration in the trial briefs, particularly that of the appellee. *Hodory v. Ohio Bureau of Employment Services, 408 F. Supp. 1016, 1022 (N.D. Ohio E.D. 1976); Brief of Appellee, pp. 41-44.* A short review of some of the more significant precedents on this almost forgotten issue clearly demonstrates that the principles enunciated therein alone compel the affirmance of the lower court's decision. Of course, this *amicus* does not mean to imply that the equal protection and due process issues can be "rigidly cabined". *U.S. Department of Agriculture v. Murry*, 413 U.S. 508, 519 (1973) (Marshall, J. concurring).

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[26] See paragraph 3 in Court of Appeals opinion, n 25 supra.

[27] The dissenting judge is now a justice of the Supreme Court of Ohio.

[28] See pp. 9-10 Brief of American Federation of Labor and Congress of Industrial Organizations, *Amicus Curiae*.

As noted by the trial court, the introductory provision of Ohio Revised Code § 4141.29 indicates that the overall purpose of the legislation is to provide benefits to eligible individuals as compensation for the loss of renumeration due to *involuntary* (emphasis) total or partial unemployment. *Hodory, supra,* 408 F. Supp. at 1021.[29] But, it has long been recognized that the specific provision of the legislation challenged by the Appellee disqualifies as beneficiaries individuals who have been "innocently", as well as voluntarily, unemployed, *Cornell v. Bailey*, 163 Ohio St. 50, 58, 25 N.E. 2d 323 (1955). The so-called "innocent bystander" provision or interpretation. It is undisputed that because of the challenged provision, the Appellee and the class of approximately 1250 Steelworkers which he has been permitted to represent were denied unemployment benefits despite the fact that they became unemployed through no fault of their own and despite the fact that they may well have been qualified to receive benefits under all other provisions of the relevant legislation. Under the foregoing circumstances, wherein the effect of the challenged provision was to create a conclusive presumption of voluntary unemployment by eligible individuals when such voluntariness was not universally or necessarily true, and because there exist reasonable alternative means of determining the voluntariness of unemployment this *amicus* believes the decisions in such cases as *Vlandis v. Kline*, 412 U.S. 441 (1973) and *Stanley v. Illinois*, 405 U.S. 645 (1972) are controlling and mandate affirmance of the judgment below.

In *Vlandis*, for example, non-residence was the means adopted by the State of Connecticut to preserve its recognized, legitimate interest in protecting and preserving the quality of its colleges and universities and the right of its own residents to attend such institutions on a preferential tuition basis. Supra, at 453. Here, voluntariness of unemployment by otherwise eligible individuals was the means adopted by Ohio to promote its legitimate interests. In *Vlandis*, the provision creating a permanent irrebuttable presumption of non-residence was found to violate the Due Process Clause because it provided no opportunity for a student who applied from out of state to demonstrate that he or she was or had become a bona fide Connecticut resident. Here, the former provision creating a permanent irrebuttable presumption of voluntary unemployment should be found to violate the

[29] While the overall purpose of § 4141.29 did relate to compensation for losses due to involuntary unemployment, it did not cover ineligible individuals. Thus, certain individuals who incurred losses due to involuntary unemployment could not receive benefits because the nature of their past employment. See, for example, Ohio Rev. Code § 4141.01 (B) (3); but see Brief of *Amicus* Republic Steel Corporation, pp. 14-15.

Due Process Clause since it provided no opportunity for an otherwise eligible individual who became unemployed due to a labor dispute at any premise owned or operated by his or her former employer to demonstrate that, as to him or her, the unemployment was involuntary or "innocent". And finally, in *Vlandis*, this Court found that Connecticut could have established such reasonable criteria for in-state status as to virtually insure that students who were not, in fact, bona fide State residents but who had come there solely for educational purposes, could not take advantage of the in-state rates. id. And here, this Court should find that Ohio could have established reasonable criteria for the involuntary unemployment status so that virtually all eligible employees who were not, in fact, involuntarily unemployed, but who had left work voluntarily, could not receive benefits as compensation for loss of renumeration. Compare the provisions of *Conn. Gen. Stat. Rev.*, challenged in *Vlandis*, with the 1972 Opinion of the Connecticut Attorney General Regarding the Non-Resident Tuition. id., at 454. And compare the provision of the *Ohio Rev. Code* challenged herein with *Ohio Rev. Code* § 4141.29 (D) (1) (A) (1) (Page's 1975 Supp.).

It is clear that the Appellee was denied participation in a government benefit program. *Vlandis*, supra. While it may be that this case deals with "a noncontractual claim to receive funds from the public treasury [which] enjoys no constitutionally protected status", the case also does not contain "a somewhat narrow range of situations lacking certain characteristics which might reasonably be thought to establish the genuineness" of the involuntary nature of the unemployment. *Weinberger v. Salfi*, 422 U.S. 749, 772 and 780 (1975). Again, compare the former and present provisions of *Ohio Rev. Code* § 4141.29 (D) (1) (A); and see *Weinberger, supra*, at 802 (Brennan, J., Dissenting). Furthermore, to the knowledge of this *amicus*, nowhere in the record has any one explicitly defended the specific provision in question as a proper method for insuring that benefits are only received by these who are involuntarily unemployed. *Weinberger, supra*, at 776. Undoubtedly, such a defense has not been asserted for no other reason than because the Ohio legislature could not have rationally concluded that the inherent inprecision of the challenged, former statutory provision was justified by the expense and other difficulties of individual determinations on the issue of voluntariness of unemployment. *id.*, at 777. Any such determinations may be neither expensive nor difficult simply because plant-by-plant, rather than person-by-person, considerations may be quite proper in most instances. Brief of Appellant, pp.3-4. Incidentally, it is interesting to note that the heir to the herein challenged provision

apparently requires many individual determinations on the voluntariness of unemployment now faced by Ohio workers in situations quite similar to the relevant situations confronted by the Appellee and the class of Steelworkers he represents. This has not proved any great difficulty in the more than forty states previously making such provision in their laws. Why then, should it be difficult in the State of Ohio?

The Appellants, as well as various *amici curiae*, proffer two major reasons to justify the challenged provision. *Vlandis, supra*, at 448. One asserted governmental interest served by the former provision involves the desire of the State of Ohio to preserve the fiscal integrity of the state Unemployment Compensation fund. The other involves the desire of the state to maintain a position of neutrality in labor matters. Each reason was carefully considered by the lower court with respect to the circumstances of this case; and that court concluded the provision in question was not justified by any legitimate state interest. Thereafter, the appellee ably and extensively reviewed the alleged rationales underlying the provision and their inapplicability to the instant litigation. Accordingly, this *amicus* shall now do no more than simply to urge the Court to find that the permanent irrebuttable presumption of voluntary unemployment created by former provision 4141.29 (D) (1) (A) of the *Ohio Rev. Code* violates the Due Process Clause of the Fourteenth Amendment and thus that the judgment of the District Court must be affirmed.

CONCLUSION

For the foregoing reasons this Honorable Court should ignore the suggestion of untimely application of the abstention doctrine, as made by a non-party, hear the appeal on its merits and affirm the judgment of the three judge court on due process as well as equal protection grounds.

Respectfully submitted,

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APPENDIX TO BRIEF

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

JAMES W. NUNAMAKER, ET AL., *PLAINTIFFS-APPELLEES,*	)	OPINION
vs.	)	Case No. 4344
UNITED STATES STEEL CORPORATION, *DEFENDANT-APPELLANT.*	)	

APPEARANCES.

Herschel Kriger, Canton, Ohio, David Clayman, Columbus, Ohio, and Robert M. Murphy, Youngstown, Ohio, for Appellees, James W. Nunamaker, et al.

William B. Saxbe, Attorney General, and Bernard L. Heffernan, Assistant Attorney General, Columbus, Ohio, and Paul W. Zellers, Assistant Attorney General, Youngstown, Ohio, for Appellees, Administrator and Board of Review, Bureau of Unemployment Compensation.

Frank C. Manak, Cleveland, Ohio, and Manchester, Bennett, Powers & Ullman, Youngstown, Ohio, for Appellant, United States Steel Corporation.

Hon. Paul W. Brown,
Hon. James G. France,
Hon. George M. Jones, JJ.

Dated: November 26, 1963

Grace Marten,
Court of Appeals Reporter,
Mahoning County Courthouse,
Youngstown, Ohio.

UNEMPLOYMENT COMPENSATION
RECIPIENTS OF VACATION PAY

Vacation pay received by laid-off workers in excess of the unemployment benefits will not affect their right to receive such benefits by virtue of the provisions of Section 4141.31 (B-2) Revised Code.

APPEAL - WEIGHT OF EVIDENCE
AGREED STATEMENT OF FACTS

The question of weight of evidence does not arise in a case tried on an agreed statement of facts, which is in the nature of a special finding of facts as agreed upon by the parties.

NUNAMAKER et al v. UNITED STATES STEEL CORPORATION
(1963)

Mah. App. 206

Motion to certify filed: 37 0 Bar 115. Allowed 37 0 Bar 586 Judgment reversed: 20S2 55; 31 00 2 47 2 06 71E2 206.

FRANCE, J.

This case involves the allowance of unemployment compensation for the week of July 3, 1960, to the bulk of the 123 claimants, all employees of United States Steel Corporation at its Ohio Works in this county. As to a few of the claimants the week in question is a later one but no significant difference in the operative facts or legal conclusions occurs.

The Administrator, Bureau of Unemployment Compensation, allowed the claims on various dates in July, 1960, and confirmed such allowance in a decision on reconsideration August 27, 1960.

By letter dated September 2, 1960, but not shown as received until October 4, 1960, appeal was taken to the Board of Review which consolidated the cases and held them before proceeding further for approximately two years. It then received, through its referee, on October 23, 1962, an agreed statement of facts covering all cases and on November 9, 1962, entered decision (one member dissenting) reversing the Administrator's decision and disallowing each and every claim. On appeal to the Court of Common Pleas that Court (Maiden, J.) on June 18, 1963, reversed and vacated the Board's decision and awarded judgment in favor of each claimant for the amount allowed by the administrator. Appeal on questions of law brings this judgment before us for review.

The consolidated case was heard by the Board of Review, and its decision was based, *"upon the file certified* to the Board by the Administrator of the Bureau of Unemployment Compensation *and the agreed statement of facts* entered into between the representatives of the claimant and the representatives of the United States Corporation * * *" (emphasis added).

The facts as so agreed upon and stipulated which are essential to the determination are:

> "4. That during 1960 and 1961 there was an agreement between the United Steel Workers of America and the United States Steel Corporation which governed the employee-employer relationship which agreement is marked 'Joint Exhibit A' and is made a part of this record.
>
> "5. That Section 12 of said 'Joint Exhibit A' deals with vacations and vacation pay.
>
> * * * * *
>
> 7. That shortly prior to the week in issue in each case, each claimant was advised by his foreman that he would be laid off was was asked whether or not he wanted to take his vacation and vacation pay during the week in question and that each claimant elected to take his vacation and vacation pay during such week.
>
> "8. That the vast majority of the claimants had originally scheduled their vacation for a period of time subsequent to the week in question and a few may have originally been scheduled for a vacation during the week in question.

"9. That each claimant was paid vacation pay with respect to the week in question in an amount in excess of the weekly benefit amount.

"10. That approximately 60% of the claimants returned to work immediately after the week in question and the remaining 40% of the claimants were not scheduled to return to work until a later date."

The pertinent parts of Joint Exhibit A are as follows:

"Section 12. Joint Exhibit A.

"C. Scheduling of Vacation.

"Promptly after March 1 of each calendar year each eligible employee shall be requested to specify the vacation period he desires. Vacations will, so far as practicable, be granted at times most desired by employees (longer service employees being given preference as to choice); but the final right to allot vacation periods and to change such allotments is exclusively reserved to the Company in order to insure the orderly operation of plants; provided that vacations shall be scheduled, in the absence of mutual agreement between local plant management and local grievance committee to the contrary, between May 1 and October 1 of each calendar year or, with the consent of the employee, at such other time during the calendar year as may be agreeable to the plant Management and the employee.

"D. Vacation pay.

"Each employee granted a vacation will be paid at his average rate of earnings per hour for the first two of the last four closed and calculated pay periods worked by the employee preceding the first week of the actual vacation period. * * *

"E. Vacation allowance.

"The Union and the Company agree that their mutual objective is to afford maximum opportunity to the employees to obtain their vacations and to attain maximum production. All employees eligible for vacation shall be granted their vacation from work * * *."

The provisions of the Unemployment Compensation Law bearing on the question are:

Section 4141.29, Revised Code:

"Each eligible individual shall receive benefits as compensation for loss of remuneration due to total or involuntary partial unemployment in the amounts and subject to the conditions stipulated in sections 4141.01 to 4141.46, inclusive, of the Revised Code * * * "

Section 4141.01, Revised Code, provides in part:

"(M) An individual is 'totally unemployed' in any week during which he performs no services and with respect to such week no remuneration is payable to him.

Section 4141.31:

"(B) Benefits payable for any week shall not be reduced by the amount of remuneration claimant receives with respect to such week in any of the following forms:

"(2) Vacation pay or allowance paid to an individual with respect to weeks of unemployment during which he is unemployed for reasons other than being on 'vacation'; * * *."

The Board of Review, finding that each of the claimants requested vacation during the week in question, applied Section 4141.01 (M) to find that remuneration was received and that therefore under Section 4141.29 no benefits were payable because there was no loss of remuneration. In effect if found it unnecessary to pass on the question of whether the unemployment was "for reasons other than being on vacation" under Section

The Common Pleas Court determined that the Board's failure to apply Section 4141.31 (B) was unlawful and that the decision was therefore unreasonable. Of the five assignments of error argued, Numbers 1, 3, 4 and 5 revolve around this legal conclusion and will be discussed together.

We agree with the trial judge that the question of whether the vacation pay was remuneration for the purposes of Section 4141.29 cannot be so summarily disposed of as the Board sought to do. Since Section 4141.31 (B) provided that benefits shall not be reduced by remuneration received for vacation pay under certain circumstances, it follows *a fortiori* that they cannot be eliminated by it, since elimination is merely reduction to point zero. Therefore, regardless of the statute's use of an inept word to express the thought, vacation pay is *not* remuneration within the meaning of Sections 4141.01 (M) and 4141.29, Revised Code, if the unemployment was "for reasons other than being on vacation".

It is therefore essential to determine what was the reason or cause, not for the receipt of the pay, but for the failure to work. If failure to work was caused by being on vacation then no benefits are payable; if it was caused by other reasons, whether lack of work to be performed or "layoff", then they are payable.

For the solution of this question we are thrown squarely on the meager and, in some respects, unsatisfactory language of paragraph 7 of the agreed statement:

"That *shortly prior* to the week in issue in each case, each claimant was advised by his foreman that *he would be laid off* and was asked whether or not be wanted to take his *vacation and vacation pay* during the week in question and that each claimant elected to take his vacation and vacation pay during such week".

We are not informed as to whether the "layoff" was merely a temporary and partial reduction in force or a plant shut down, or

whether the election offered involved opportunity for reflection and consultation with members of the employees' families or was required to be made immediately. The bland language of paragraph 10 is particularly uninformative on whether the 60% of the claimants were recalled to work by the foreman at the end of the week or returned as a matter of course, and whether the remaining 40% who were not scheduled to return were not scheduled because their vacations were not complete or because a lack of work still existed as to them.

All these questions are important in determining the ultimate fact of causation of unemployment, whether it was vacation on one hand or "no work available" or "layoff" on the other. Yet the Board, the trial judge and the members of this court are asked to do so without the answers to them.

Counsel for the employer stresses the fact that the immediate cause of unemployment must have been vacation, because a layoff cannot be in effect until the day it is scheduled to occur. This is, of course, likewise true as to vacations and does not answer the question. He argues further that the statement in paragraph 7 that the worker "would be laid off" was only an expressed intention to lay off in the future, but that the *subsequent* "election" of the worker to take vacation became a binding and irrevocable step which precluded the layoff when the time for it occured. This does not follow, for while the employer, in theory only, might of his own volition cancel the layoff before the time for it occurred, he could equally be recourse to Section 12C of the employment contract, unilaterally change the allotment of vacation period, subject only to the requirement that it was to insure orderly operation of the plant. While both the layoff decision and the vacation allotment were, in theory, tentative and revocable, in the course of operating a large and complex industrial plant either decision when made "shortly before the week in question" was, in fact, final and it is the priority of decision in point of time rather than revocability which should determine causal connection.

There is nothing in paragraph 7 of the statement to indicate that the layoff was conjectural, tentative or in the course of consideration. The foremen's message has suffered somewhat in its re-rendering of person, tense and mood to get into a stipulation. To the writer it does not say: "You *might be laid off* on July 3 unless you take your vacation then". It ways, on the contrary: *"There will be no work* for you from July 3 on in any event. Do you want to forego your later planned vacation so that, while we have no work for you, you can use up your vacation time and take your vacation pay?" This was the "election" made by the worker and this election could have absolutely no effect on whether there would be work at the plant for him to perform on July third. The real and effective cause of the claimant's lack of employment in each case was, therefore, that the employer had no work ready for him to perform, not that he had adjusted his vacation plans to conform to the employer's economic decision. In terms of proximate causation, that is the effective cause, he was idle for reasons "other than being on vacation" and the fact that he could elect to treat the employer-forced idleness as a reason for using up contracted for vacation time and receiving contracted for vacation pay cannot alter that essential fact.

This analysis is born out by the amazing lack of selectiveness of the various foremen in dealing with their men. If we are to consider paragraph 8 of the agreed statement they sought out men who had previously been alloted a vacation during the week in question to inform them, without qualification, that "they would be laid off". This is not indicative of negotiation for or of imposition of a general plant vacation; it is announcement of general layoff for lack of work to be performed. We conclude that assignments of error 1, 3, 4 and 5 are not well taken.

The second assignment of error is that "the Court of Common Pleas erred in saying that there was no dispute as to the evidence and then in vacating and reversing the decision of the Board of Review on the basis of inferences it chose to draw from the evidence and the Board's finding of fact".

In this connection appellant devotes much argument to questions of "weight of the evidence". There is no "weight of the evidence" in this case because there was no evidence as such; there was only an agreed statement of fact which is in the nature of a special finding of facts. Knowlson v. Bellman, 160 Ohio St. 359. As to the trial judge's incursion into the file for statements of the employer, as claimed in brief, this was a search for clarification of "facts" as agreed upon. In the view taken of the agreed statement of facts, this incursion was not necessary to the trial judge's decision. The error, if error there was, is therefore not prejudicial.

By way of commentary on the selections made by appellant from the various documents we find that the question of eligibility of the claimants to *supplemental* unemployment benefits has no bearing on their eligibility for the benefits in question, since one depends on construction of a private contract, the other on statute. Nor does the power of the employer to assign vacations without regard to the employees' wishes have any bearing on the question before us, since it is not claimed that this power was ever exercised.

Nor are we concerned with the social or moral desirability of a man receiving contracted for vacation pay covering the same period for which he draws unemployment compensation, so long as he can simultaneously qualify under the statute and his contract. If it

is socially undesirable, recourse can be had to the legislature to change the statute which has, in fact, already been done. But changes made in the statute since the period in question are not retroactive. Our duty is merely to apply the facts to the statute as it then stood, not to change the meaning of that statute to conform to an afterthought of a later legislature. We no not consider the cases of Reid v. Board of Review, Bureau of Unemployment Compensation of Ohio, 155 Ohio St. 6, Mohawk Rubber Co. v. Popeko, case number 4249 Court of Appeals of Summit County, or Dahman v. Commercial Shearing and Stamping Co., et al, 13 Ohio Opinions (2d) 368, or the multitude of other cases decided on the law as it existed prior to adoption of Section 4141.31 (B) in 1959 at all determinative or even helpful in disposing of the question here involved, since they were all decided without reference to the statutory language with which we are confronted.

We find no assignment of error well made and the decision of the Court of Common Pleas, Mahoning County, is affirmed.

Jones, J., Concurs in Judgment.
Brown, P.J., Dissents.

APPROVED:

JAMES G. FRANCE
JUDGE.

BROWN, P.J., DISSENTING.

It is undisputed in the stipulation or elsewhere in the record that the appellees-claimants for unemployment compensation, subsequent to being advised that a lay-off was impending, voluntarily elected to take vacation and vacation pay.

Nowhere in the law is there authority to pay unemployment benefits to an individual who is on vacation.

A person who is on vacation and receiving vacation pay is not an eligible individual under Revised Code Section 4141.01 (M).

Revised Code Section 4141.31 (B) (2) does not apply. That section has to do with what benefits payable shall not be reduced by, and there are no benefits payable under the statute in this case. This was the finding of the Board of Review and is entirely correct unless the voluntary agreement to go on vacation becomes unlawful under Revised Code Section 4141.32 when the employer suggests that a layoff is imminent.

In order to arrive at this conclusion we would have to read into Revised Code Section 4141.32 a legislative intent, which we are not justified in doing in view of the clarity and lack of ambiguity of that section.

The trial court erred in finding that Revised Code Section 4141.31 (B) (2) applied to these facts.

The judgment of the Court of Common Pleas should be reversed.

APPROVED:
PAUL W. BROWN
JUDGE.